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No. 53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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No. 683

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BRIEF OF RESPONDENT IN OPPOSITION

I.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals is reported in 36 F. (2d) 49.

The findings of fact and opinion of the Board of Tax Appeals (R. 11-15), are reported in 15 B. T. A. 931.

II.

JURISDICTION

The order of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered on November 22, 1929. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III.

QUESTION PRESENTED

The question presented is whether or not the day on which a federal income tax return is filed is to be counted in computing the time within which assessment may be made of a deficiency in tax. The decision below holds that the day on which the return is filed must be included in the computation of such time. The decision of the Board of Tax Appeals reviewed by the court below holds that limitation time begins to run at midnight after the return was filed.

IV.

STATEMENT

The pertinent facts as found by the Board of Tax Appeals are as follows (R. 11, 12):

The taxpayer closed its books of account annually as of May 31, but made its income and profits tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the

collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner held that the returns should not be filed upon the calendar year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Commissioner required the taxpayer to file amended returns upon the fiscal year basis for the years ended May 31, 1920 and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for said fiscal years 1920 and 1921. The taxpayer appealed to the Board of Tax Appeals and then to the Circuit Court of Appeals for the Fifth Circuit. Both held that the period of limitations did not begin to run until the filing of the last calendar year return embracing a portion of the particular fiscal year. But the Circuit Court of Appeals held that in computing the period of limitation the day of the filing of the return should be included, and reversed on the ground that the assessment was made one day late because in computing the period the Commissioner had excluded the day of the filing of the return.

V.
SUMMARY OF ARGUMENT

1. This Court has not construed the particular statute in question and therefore the decision below is not contrary to the decisions of this Court.

2. The decision below is thought not to be in conflict with the decisions of other Circuit Courts of Appeals for the reason that no other Circuit Court of Appeals has construed the particular statute.

3. To construe the statute otherwise, it is thought, would enlarge the taxing statute and therefore be clearly erroneous.

4. Doubt in limitation sections of the taxing statute, it is believed, should be resolved in favor of the taxpayer and against the Government.

5. The decision of the court below holding that the day on which the tax return was filed should be included in the computation of the time within which an assessment might have been made is supported in principle by numerous decisions.

VI.

ARGUMENT

1. Counsel for the petitioner has submitted as reasons for granting the writ that the decision below is contrary to the decisions of this Court in certain cited cases, in which cases this Court has construed particular statutes and laid down certain principles in computing periods of time for the performance of an act.

It is believed that the decision below is not contrary to the decisions of this Court in the cited cases for the following reasons:

(a) The statute construed by the court below has not been considered by this Court in any of these cases.

(b) The decisions cited by counsel for the petitioner relate specifically to other time statutes and none of them relate to limitation sections of a taxing statute of the United States.

(c) It is thought that the rule to be applied in the computation of limitation periods, whether it runs from the day of date or the happening of an event upon a date, must depend upon the particular words of the phrases construed. This proposition is believed to be sustained by the following quotation from one of the decisions cited by petitioner:

> "Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled. Still it must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases * * *"

Dutcher v. Wright, 94 U. S. 553.

2. The particular question presented in this case has not been decided by any Circuit Court of Appeals other than the court below, for the reason that no other Circuit Court of Appeals has been called upon to decide the question as it relates to the particular statutes fixing the time within which federal income taxes, for any years, may be assessed by the Commissioner of Internal Revenue. The question, as it relates to other time statutes, has been decided by other Circuit Courts of Appeals, but it is believed that such decisions do not constitute a conflict such as is contemplated as a basis for review by this Court.

3. The statutes involved, fixing the time within which the assessments in controversy might have legally been made, are a part of the same statute creating the liability for the tax, and as such it is

thought constitute a limitation upon the right to assess the tax at all. With respect to this section 250 (d) Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083)

> "* * * the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, * * *."

The substance of this limitation has been brought forward into each of the succeeding taxing statutes, the only change being made by subsequent statutes was to change "was due or was made" to "was filed". It is thought that to eliminate from the computation of the time within which the assessment in controversy might have been made would necessarily result in the enlargement of that time and therefore the enlargement of a taxing statute.

The protection to the Government by fixing the period of five years within which to assess deficiencies was fully attained, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

4. Counsel for the petitioner submits that doubt in connection with the particular statute under consideration should be resolved in favor of the Government rather than in favor of the taxpayer and against the Government; and has cited in support of that contention certain case including Bowers vs. New York & Albany Lighterage Company, 273 U. S. 346, 47 Sup. Ct. Rep. 389.

It is thought that counsel for the petitioner has

misinterpreted the decision of this Court in Bowers vs. New York & Albany Lighterage Company. In that case this Court said:

> "He maintains that any ambiguity in the clause under consideration must be resolved in his favor. Undoubtedly the United States will not be held barred by a general statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute. That rule rests upon the general principle of policy applicaple to all governments that the public interest should not be prejudiced by the default or negligence of public officers. The limitation applies to petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."

It is thought that this Court in the cited case definitely laid down the rule that where a limitation section is a part of a taxing statute, the rule to be applied in connection with such limitation section is the rule that such laws are to be interpreted liberally in favor of the taxpayers, notwithstanding the fact that the section is in the nature of a limitation statute against the United States.

VII.

5. The decision below holds that the jeopardy assessment made on March 15th, 1926, upon returns filed for 1920 on March 15th, 1921, and for 1921 on March 15th, 1922, was too late, the statute requiring assessment within five years after the return for 1920

was filed and within four years after the return for 1921 was filed, for the reason that the day on which the return filed should be included in the computation of the limitation period. The Board of Tax Appeals, by that decision reviewed, had held that the assessment was timely for the reason that the limitation period fixed by the statutes did not begin to run until midnight after the returns were filed.

In Arnold vs. United States, 9 Crench, 119, this Court said:

> "* * * And it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included."
>
> "From the making is inclusive and 'from the day of making' is exclusive."
>
> Clayton's Case, 5 Coke Eng. 1.

There are numerous decisions of courts of lower jurisdiction sustaining the principle that as a general rule, in absence of legislation controlling the subject, and in the absence of any established rule for the interpretation of such statutes as to liberal or strict construction, the day on which the act is done is to be included. These are not cited as it is thought that such decisions would be persuasive only, and therefore, improperly cited in this brief.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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Atlanta, Georgia.

March, 1930.

APPENDIX A

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> Sec. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> Sec. 250. (d) The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or

proceeding for collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

Sec. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)